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UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.

Issued by the Department of Transportation  
on the 18th day of November, 1996

Application of

CONTINENTAL AIRLINES, INC.

for an exemption pursuant to 49 U.S.C. §40109  
(Newark-Rome/Milan, Houston-Rome)

**Docket OST-95-348**

Application of

ALITALIA-LINEE AEREE ITALIANE-S.p.A.

for an exemption from 49 U.S.C. §41301

**Docket OST-95-347**

Application of

CONTINENTAL AIRLINES, INC., CONTINENTAL  
EXPRESS AND ALITALIA-LINEE AEREE  
ITALIANE-S.p.A.

for Statements of Authorization under Parts 207 and  
212 of the Department's Regulations to engage in  
code-sharing and wet lease operations

**Undocketed**

# ORDER

## Summary

By this order we grant the joint application of Continental Airlines, Inc.; Continental Express, Inc.; and Alitalia-Linee Italiane S.p.A. for renewal of exemptions and statements of authorization to engage in code-share operations in the U.S.-Italy market, subject to conditions described in this order. We deny, however, the applicants' request to expand their wet-lease authority beyond their current operations. The authority granted will be effective for a period of two years from the date of service of this order.

## Application

On September 20, 1996, Continental, Continental Express, and Alitalia filed a joint application in the above-referenced dockets to renew, for a two-year period, the exemptions and statements of authorization for Newark-Rome/Milan and Houston-Rome and other cooperative services previously granted by Order 95-11-20 and to amend the Continental statements of authorization to permit Continental to wet-lease up to three aircraft to Alitalia for Newark-Rome/Milan flights.

## A. Renewal

The carriers request renewal of (1) Continental's exemption from 49 USC §41101 to engage in scheduled foreign air transportation in the Newark-Rome/Milan and Houston-Rome markets on a code-share basis with Alitalia; (2) Alitalia's exemption from 49 USC §41301 to engage in scheduled foreign air transportation between Rome and Milan and the coterminal points Newark/San Francisco, Newark/Detroit, Newark/Cleveland, and Newark/Houston, and beyond Houston to Mexico City, Mexico; and between Rome and Houston and beyond to Mexico City under a code-sharing arrangement with Continental; (3) Continental's statements of authorization under Part 207 of the Department's regulations to (a) display Alitalia's designator code (AZ) on Continental's Newark-Detroit/Cleveland/San Francisco/Houston, Newark/Houston-Mexico City flights and Newark/Houston-Mexico City and Newark/Houston-Rome/Milan flights; (b) display Alitalia's designator code (AZ) on Continental's and Continental Express' flights in the Newark-Philadelphia and Newark-Washington, D.C. markets; and (c) wet lease [one] aircraft to Alitalia for services in the Newark-Rome market; and (4) Alitalia's statement of authorization under Part 212 of the Department's regulations to display Continental's designator code (CO) on Alitalia's Newark-Rome/Milan and Rome-Houston-Mexico City flights.<sup>1</sup>

## B. Amendment

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<sup>1</sup> The joint applicants note that in their previous renewal application (in 1995) Alitalia inadvertently omitted reference to its Rome/Milan-New York(Newark)-Mexico City exemption issued concurrently with Continental's statement of authorization (March 22, 1995 Notice of Action Taken, Order 95-5-16). As a result, they state, Alitalia's exemption was inadvertently omitted from the previous renewal. Alitalia requests here renewal of its Rome/Milan-New York (Newark)-Mexico City exemption as part of this overall renewal application.

The joint applicants also seek to amend Continental's statements of authorization to permit Continental to wet lease up to three aircraft to Alitalia for Newark-Rome/Milan flights. They state that Continental seeks the flexibility to operate up to two daily Newark-Rome flights and one daily Newark-Milan flight as wet leases to Alitalia if appropriate authority can be secured in Italy as well as holding the authority to operate these services as Continental flights.

### Positions of Commenting Parties

The Mayor of Cleveland and the Cleveland Hopkins Airport filed answers in support of the joint application.

American Airlines, Inc., and United Air Lines, Inc. filed answers. Northwest filed a consolidated reply to the answers filed. The Joint applicants filed a reply to American's and United's answers and a surreply to Northwest's reply.<sup>2</sup>

American, United, and Northwest do not oppose renewal of existing authority but do oppose the amendment. They object to the joint applicants' expanding the operation in the Newark-Italy market from one to three daily frequencies in circumstances where the Government of Italy severely restricts U.S. carrier services and denies U.S. carrier routes and frequencies they need to mount effective competitive services. They argue that the Department should use this request to increase operations as leverage to obtain expanded opportunities for U.S. carriers and should defer action on the request to expand services pending such consultations between the two governments.

Northwest also argues that the Department's first priority in terms of obtaining additional U.S.-Italy service opportunities should be to secure authority to enable Northwest to implement nonstop Detroit-Rome service. It notes that in approving the last Continental/Alitalia code-share wet-lease arrangement, the Department acknowledged the restrictive nature of the bilateral and stated that it remained interested in expanding the aviation relationship. Since issuance of that order, however, Northwest states the United States has made no progress in obtaining additional U.S. carrier opportunities.

On reply and surreply, the joint applicants reject the arguments of United, American and Northwest. They disagree that an exchange of rights is necessary to warrant approval of their application. Continental/Alitalia state that without any action by the U.S. government, Alitalia could institute today the flights which Continental proposes to operate as wet leases to Alitalia, noting that Alitalia has operated Newark-Milan services by wet leasing aircraft from third-country carriers and that the substitution of Continental for third-country wet lessors is unquestionably a U.S. benefit. They maintain that giving Continental the flexibility to operate wet-lease flights in the Newark-Milan market as an alternative to its current ability to operate such flights on its own serves all the U.S. interests. Withholding the request, they argue, offers no meaningful incentive to Italy as Alitalia is seeking no extrabilateral authority here.

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<sup>2</sup> American's answer was accompanied by a motion for leave to file one day late. Northwest's consolidated reply was accompanied by a motion for leave to file an otherwise unauthorized document. The joint applicants' surreply was also accompanied by a motion for leave to file an unauthorized late document. In the interest of a complete record, we will grant the motions.

## Decision

We have decided to renew the existing regulatory authorities held by the joint applicants to engage in U.S.-Italy code-share operations.<sup>3 4</sup> We will not, however, approve Continental's request to increase its current wet-lease operations from one to three aircraft for services in the Newark-Rome/Milan market. The authorities granted will be effective for a period of two years and will be subject to the same conditions imposed in Order 95-11-20.<sup>5</sup>

In considering the various requests that Continental/Alitalia have filed before us, beginning in 1994 and continuing through their renewal and amendment request of last year, we have always carefully balanced a number of public interest factors. Thus, for example, while we recognized the restrictions prevailing in our aviation relationship with Italy, we also recognized a number of significant public benefits that approval would offer. *See, e.g.*, Order 94-9-4 at 7. Balancing these positive benefits against the restrictive bilateral context and taking into account all the circumstances presented, we concluded that the proposed Continental/Alitalia arrangements would sufficiently further our international aviation objectives as to justify approval.

In reviewing the current application, we are once more called upon to balance the various factors essential to our public interest determination. As to the existing authority, for which the joint applicants seek simply renewal, we conclude that the balance favors continued approval. We see no reason to alter our previous favorable assessment about the value and relative weight of the benefits accruing from those ongoing aspects of the Continental/Alitalia arrangements.

However, we do not reach the same conclusion about the portion of the current joint request that would represent an expansion of authority. In performing our public interest analysis, we cannot ignore that in the two years since our initial approval, the Italian side has shown no movement in the direction of liberalization, and this despite an accumulation of U.S. carrier aspirations to expand existing services or to introduce new services in the U.S.-Italy market. It is against this unchanging pattern of restrictive Italian behavior that we must weigh the public benefits represented by the requested amendment. We see these benefits as far less significant and of far lesser reach than those derived from the previously submitted Continental/Alitalia requests. In these circumstances, we conclude that the balance as to this aspect of the application does not favor approval.

We note that the applicants argue that denying their request will not give us leverage with the Italians especially since Alitalia can wet lease from third-country airlines. However, the issue is whether or not it is in the public interest for us to use our discretion here to expand the scope of Alitalia's wet-leasing capabilities. Based on the public interest calculation outlined above, we conclude it is not.

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<sup>3</sup> We will also restore Alitalia's Rome/Milan-New York (Newark)-Mexico exemption authority which the carrier inadvertently omitted from its renewal application last year.

<sup>4</sup> On the basis of officially noticeable data under Rule 24(n), we also find that Continental and Alitalia are financially and operationally qualified to provide the services at issue. *See* Order 95-6-26 for Continental and Order 71-4-1 for Alitalia.

<sup>5</sup> As no party objected to the request for renewal for a two-year period, we will grant the renewal for two years.

As we noted in Order 95-11-20, we remain interested in expanding our aviation relationship with Italy, and we will continue to seek broader rights for U.S. carrier services when the Italian Government shows an interest in entering discussions to address our concerns.

**ACCORDINGLY,**

1. We renew the authorizations granted Continental Airlines, Continental Express and Alitalia-Linee Aeree Italiane, S.p.A. by Order 95-11-20 as follows:

a. Exemption from 49 U.S.C. section 41101 to Continental to engage in scheduled foreign air transportation of persons, property, and mail between Newark, New Jersey, and Houston, Texas, on the one hand, and Rome and Milan, Italy, on the other, on flights operated by Continental and/or by Alitalia, provided that all such flights are operated in accordance with the code-share arrangement with Alitalia Linee Aeree Italiane, S.p.A.;

b. Exemption from 49 U.S.C. section 41301 to Alitalia-Linee Aeree Italiane, S.p.A. to engage in scheduled foreign air transportation of persons, property, and mail between (i) Rome and Milan, Italy, on the one hand, and the coterminal points Newark/San Francisco, Newark/Detroit, Newark/Cleveland, and Newark/Houston, and beyond Houston to Mexico City, Mexico, under a code-sharing arrangement with Continental Airlines, Inc.;

(c) Statement of Authorization to Continental Airlines, Inc. under Part 207 of the Department's Regulations to display Alitalia's airline designator code (AZ) on Continental's flights between (i) Newark, New Jersey, on the one hand, and Detroit, Cleveland, San Francisco, and Houston, on the other; (ii) Houston and Mexico City, Mexico; (iii) Newark, New Jersey, and Houston, Texas, on the one hand, and Rome and Milan, Italy, on the other, under a code-share arrangement with Alitalia; and (iv) to wet lease one aircraft to Alitalia for services between Newark and Rome;

(d) Statement of Authorization to Continental Airlines, Inc. and Continental Express under Part 207 of the Department's regulations to display Alitalia's airline designator code (AZ) on their flights between Newark, New Jersey, on the one hand, and Philadelphia, Pennsylvania, and Washington, D.C., on the other, under a code-share arrangement with Alitalia;

(e) Statement of Authorization to Alitalia under Part 212 of the Department's regulations to display Continental's airline designator code (CO) on Alitalia's flights between Newark and Rome/Milan, and between Rome and Houston and beyond Houston to Mexico City;

2. We renew Alitalia's exemption authority to serve in the Rome/Milan-New York (Newark)-Mexico City markets;

3. The authorities granted above are effective immediately and shall remain in effect for a period of two years from the date of service of this order;

4. All of the flights authorized by this order, whether operated by Continental or Alitalia under the code-share arrangement, are subject to the frequency limitations for Alitalia set forth in the 1990 Memorandum of Understanding, as amended, and to the further condition that, upon request, the parties will provide to the Director, Office of International Aviation, a full

description of the services operated under the authorities granted to ensure compliance with the provisions of the MOU;

5. The approvals and authorizations renewed and granted by this order shall be subject to the conditions that neither Continental nor Alitalia shall give any force or effect to any exclusivity provisions of their arrangements insofar as such provisions restrict Continental from entering into an arrangement with a carrier, other than a carrier based in Italy, except with respect to service between the United States and Italy;

6. The code-sharing operations authorized by this order are expressly conditioned upon the requirement that the subject foreign air transportation be sold in the name of the carrier holding out such service in computer reservation systems and elsewhere, that the carrier selling such transportation (*i.e.*, the carrier shown on the ticket) accepts all obligations established in its contract of carriage with the passenger; that the foreign air carrier operating service under this

arrangement does not place the code of its U.S. carrier code-share partner on any flight that enters, departs, or transits the airspace of any area for whose airspace the Federal Aviation Administration has issued a flight prohibition; and that Continental, Continental Express, and Alitalia comply with the rules for airline designator code-sharing set forth in 14 CFR 399.88 of the Department's regulations, and any amendments to the Department's regulations concerning code-share arrangements that may be adopted;

7. In the conduct of the services authorized, Alitalia must adhere to the applicable terms, conditions and limitations of its foreign air carrier permit (Order 71-4-1);

8. We grant all motions for leave to file late documents and/or otherwise unauthorized documents in this proceeding;

9. We deny the application to the extent it seeks approval of wet-lease services with more than one aircraft in the Newark-Rome/Milan market;

10. We may amend, modify or revoke this authority at our discretion at any time and without hearing;

11. To the extent not granted, or denied in paragraph 9 above, we deny all requests in the captioned applications; and

12. We will serve this order on Continental Airlines, Inc.; Alitalia-Linee Aeree Italiane-S.p.A.; American Airlines, Inc.; United Air Lines, Inc.; Northwest Airlines, Inc.; the Mayor of Cleveland, Ohio; the Cleveland Hopkins International Airport; the U.S. Department of State

(Office of Aviation Negotiations); the Ambassador of Italy in Washington, D.C.; and the Federal Aviation Administration.

By:

**CHARLES A. HUNNICUTT**  
Assistant Secretary for Aviation  
and International Affairs

(SEAL)